MALAYSIAN REPORTS

MALAYSIAN ARMED FORCES CO-OPERATIVE HOUSING SOCIETY LTD. v. NANYANG DEVELOPMENT (1966) SDN. BHD.

[O.C.J. (Mohamed Azmi J.) December 31, 1971]

[Kuala Lumpur — Civil Suit No. 807 of 1971]

Practice and Procedure — Attachment before judgment — Intent to obstruct or delay judgment — Debtors Ordinance, 1957, s. 19(1)(c).

This was an application to set aside an *ex parte* order obtained by the plaintiff for attachment before judgment. The plaintiff had claimed the sum of $1,069,423.35 for the default in connection with the development of houses at Gombak. It was conceded by the defendant that the plaintiff had a good cause of action and the only issue in the case was whether there was sufficient evidence to show that in trying to dispose of a number of lots of the land the defendant had the intention to obstruct or delay the execution of any judgment which might be made against him.

Held: In this case there were proven facts, the cumulative effect of which gave rise to the irresistable inference that the defendant was making away with its immovable property with intent to obstruct or delay the execution of any judgment which might be made against it and therefore the application of the defendant to set aside the order for attachment before judgment must be dismissed.

Case referred to:-

(1) *Kepong Prospecting Ltd.* v. *Schmidt* [1962] M.L.J. 375 at p. 377.

SUMMONS.

Wong Soon Foh for the applicant/defendant.

Raja Abdul Aziz bin Raja Addruse (*Wan Ariff bin Wan Hamzah* with him) for the respondent/plaintiff.

Cur. Adv. Vult.

Mohamed Azmi J.: This is an application by summons in chambers made by the defendant to set aside an *ex parte* order obtained by the plaintiff for attachment before judgment dated December 3, 1971.

In the substantive proceedings, the plaintiff's claim is for the sum of $1,069,423.35 being the amount due to the plaintiff from the defendant as at October 1, 1971 on an account kept between the plaintiff and the defendant in connection with the development of houses at Gombak in the Mukim of Setapak, and also for interest on the said sum of $1,069,423.35 at the rate of 6½% *per annum* calculated from October 1, 1971 until realization.

The *ex parte* order dated December 3, 1971, *inter alia*, provides that, subject to the usual undertaking as to damages by the plaintiff, a sum of not less than $1,100,000 being part of the proceeds of sale of certain lands by the defendant to Sharikat Kemajuan Perumahan Pegawai2 Kerajaan Sdn. Berhad and payable by the said Sharikat to the defendant upon execution of an agreement relating to the sale be attached as soon as the said agreement is executed by the said Sharikat to the defendant as a pledge or surety to answer the just demand of the plaintiff until the trial and satisfaction of any judgment that may be made against the defendant in relation to such action, and, in the alternative, if the sale aforesaid be not proceeded with there be attached the properties of the defendant which are specified in the schedule annexed thereto.

In making the *ex parte* order dated December 3, 1971, I was satisfied from the supporting affidavit that the plaintiff had a good cause of action and that the defendant with intent to obstruct or delay any judgment that might be entered against it, was making away with or handing over certain immovable properties in the Mukims of Ampang and Setapak to the said Sharikat. In the application to set aside the *ex parte* order, it is conceded by learned counsel for the defendant that the plaintiff has a good cause of action, and it is also not in dispute that at the time when the *ex parte* order was made, the defendant was in the final stage of executing an agreement with the said Sharikat for the sale of 219 lots of land.

Therefore, the only issue in this case is whether there is sufficient evidence to show that in trying to dispose of the 219 lots of land, the defendant has the intention to obstruct or delay the execution of any judgment which may be made against it. In my view, such intention can be proved either by direct evidence or by inference from proven facts. Thus, in dealing with the words "with intent to obstruct or delay" in section 19(1)(c) of the Debtors Ordinance, 1957, Thomson C.J. (as he then was) in the case of *Kepong Prospecting Ltd.* v. *Schmidt*[1] said:

"Here I do not wish to appear to be unduly technical. I entirely agree with the argument of Enche Ramani that this requirement is sufficiently fulfilled if the applicant satisfies the court of the existence of facts from which the inference should be drawn that there has been the required intent."

In the present case, I find there are proven facts, the cumulative effect of which gives rise to the irresistable inference that the defendant is making away with its immovable property with intent to obstruct or delay execution of any judgment which may be made against it

First, as it is admitted that the plaintiff has a good cause of action, it is difficult to fathom why the defendant should attempt to repudiate the two agreements reached between itself and the plaintiff, *viz.* the agreement dated March 10, 1966 and the memorandum of understanding. From these two agreements, it is clear that the defendant agreed with the plaintiff that the obligation of the plaintiff and of the defendant as regards the dwelling houses to be purchased and sold respectively was limited to such number as would be actually booked by the members of the plaintiff society. These two agreements have in fact been admitted by paragraph 2 of the statement of defence, although the defendant contends that their terms have been varied by subsequent agreements contained in the minutes of meetings held twice in 1970. Bearing in mind that the defendant knew of the existence of these two agreements, its attitude in asking for further particulars in respect of the memorandum of understanding gives support to the contention of the plaintiff that the defendant was merely trying to delay the just demand of the plaintiff as long as possible until the sale of the 219 lots of land to the said Sharikat has gone through.

Secondly, the request by the defendant for particulars of how the sum of $1,729,233.14 as contained

in paragraph 6(a) of the statement of claim is arrived at also appears to have been done merely for the purpose of delaying the just claim of the plaintiff, having regard to the fact that this figure can easily be obtained by adding certain figures in the letter dated September 1, 1967 given by defendant itself. The figure of $1,186,466.86 mentioned in paragraph 6(b) of the statement of claim, being the credit balance in favour of the plaintiff as on May 31, 1967, is also admitted in that letter.

Thirdly, it should be noted that plaintiff filed its specially endorsed writ on September 30, 1971. At the request of the defendant, the plaintiff allowed the statement of defence to be filed by November 7, 1971. But the frivolous request for particulars as mentioned earlier on, was made on November 4, 1971, and, in order to avoid further delay, the plaintiff was obliged to accede to the defendant's request to file its defence one week after receipt of the particulars. The further particulars were filed in court on November 17, 1971, and the defendant filed its defence and counterclaim on November 23, 1971, but the curious thing is that a copy of the defence was not delivered to the plaintiff until December 4, 1971. In the light of this background, the admitted fact that negotiation between the defendant and the said Sharikat for the disposal of the 219 lots of land was commenced some time in October 1971, *i.e* after the filing of the writ, and the dilatory manner in which the defendant has responded to the plaintiff's claim, does indicate the intent to obstruct or delay as envisaged under section 19(1)(c) of the Debtors Ordinance.

Fourthly, it is apparent from paragraph 15 of the statement of defence that the defendant has sold 43 lots of land at a cheap price of $1.30 per square foot instead of the normal market price of $2.50. Selling the land *en bloc* at such a low price is an additional circumstance to be considered as to the intent of the defendant in trying to dispose of the subject-matter of the attachment in the present case, although that sale was a package deal involving both the lands in Gombak and Ampang.

Finally, in paragraph 8 of the defendant's first affidavit, it is deposed that the defendant is still the registered owner of six pieces of land valued at $1,587,248.46. If so, there is no reason to doubt the ability of the defendant to satisfy any judgment that might be made against it. However, apart from the fact that the alleged value of the property has not been verified, it is not in dispute that three of the properties have been charged to several banks and a finance company. Indeed, learned counsel for the defence admitted that not only three but all the six properties are in fact charged and, therefore, subject to encumbrances. Further, as deposed in paragraph 10 of plaintiff's second affidavit, the balance sheet of the defendant in respect of the year ended March 31, 1971 as filed with the Registrar of Companies discloses that the amount of liabilities and other provisions of the defendant as at that date amounted to $8,772,826.23 while its current assets comprising land and development expenditure at cost, shophouses at cost, trade and other debtors, and cash and bank balances amounted as at that date only to $8,583,739.47. In the event, the financial position of the defendant is not as rosy as it would like the court to believe.

Taking the above additional circumstance into consideration, and after considering their cumulative effect, I am more than satisfied, on the balance of probabilities, that the defendant has been deliberately delaying the substantive proceedings in order to give time to complete the sale of its lands. On the evidence before me, I am convinced that the defendant is disposing of its property *en bloc* to the said Sharikat with intent to obstruct or delay the execution of any judgment which the plaintiff may subsequently obtain in its favour. Under the circumstances, I have no alternative but to dismiss the application of the defendant to set aside the order for attachment before judgment dated December 3, 1971. I also order the costs of this application be costs in the cause.

Application dismissed.

Solicitors: *Chooi & Co.; Rithauddeen & Aziz.*

YEOH CHENG HAN v. OFFICIAL ADMINISTRATOR, MALAYA

[F.C. (Suffian, Gill & Ali F.JJ.) February 21, 1972]

[Penang — Federal Court Civil Appeal No. X. 109 of 1969]

Negligence — Road accident — Dismissal of claim by trial judge — No inherent improbability in the evidence of plaintiff.

Damages — Negligence — Loss of right arm — Assessment of damages.

In this case the trial judge had dismissed the claim of the plaintiff for damages in respect of personal injuries sustained by him as a result of an accident between a motor cycle driven by him and a motor scooter driven by one Lai Meng Hua, who died as a result of the accident. The plaintiff testified that the scooter was attempting to overtake a lorry and had gone to the wrong side of the road. The scooter suddenly swerved towards his left and he had therefore in an attempt to save himself swerved to the right to avoid the scooter. The impact took place on his side of the road.

Held, allowing the appeal: (1) in this case there was no inherent improbability in the evidence of the plaintiff and he was entitled to succeed;

(2) for the loss of his right arm the global sum of $27,500 was the correct sum to award in respect of pain and suffering, loss of amenities and loss of future earnings.

Cases referred to:-

(1) *Hornal* v. *Neuberger Products Ltd.* [1957] 1 Q.B. 247.

(2) *James* v. *Woodall Duckham Construction Co. Ltd.* [1969] 2 All. E.R. 794.

(3) *United Plywood and Sawmill Ltd.* v. *Lock Ngan Loi* [1970] 2 M.L.J. 237.

FEDERAL COURT.

Triptipal Singh for the appellant.

S. D. K. Peddie for the respondent.

Cur. Adv. Vult.

Gill F.J.: This is an appeal by the plaintiff in the action from the judgment of Wan Suleiman J. dismissing his claim for damages in respect of personal injuries sustained by him as a result of an accident